IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO: 034327

CARL WAYNE VAUGHAN, as Administrator of the Estate of RANDALL WAYNE VAUGHN,

Plaintiff Below,
Appellee Herein,

v.

INGRAM BARGE COMPANY, THE OHIO RIVER COMPANY LLC and THE OHIO RIVER TERMINALS COMPANY LLC

Defendants Below,
Appellants Herein.

APPELLANT REPLY BRIEF OF INGRAM BARGE COMPANY, THE OHIO RIVER COMPANY LLC and THE OHIO RIVER TERMINALS COMPANY LLC

Respectfully submitted by:
Counsel for Appellants

Scott L. Summers, Esq. (WV#6963)
Robert H. Akers, Esq. (WV#9622)
Offutt Nord, PLLC
812 Quarrier Street, Suite 500
Post Office Box 2833
Charleston, West Virginia 25330-2833
Telephone: (304) 529-2868
Facsimile: (304) 529-2999

and

E. Spivey Gault, Esq.
Carl J. Marshall, Esq.
Gault, Marshall & Box, PLLC
Post Office Box 30
Paducah, Kentucky 42002-0030
Telephone: (270) 442-1900
Facsimile: (270) 442-8247

TABLE OF CONTENTS

MEMORANDUM OF PARTIES

For Appellee:

Charles W. Hatcher, Jr.
Hatcher Law Office
636 Fifth Avenue
Huntington, WV 25701
Counsel for Carl Wayne Vaughan, as Administrator of the Estate of Randall Wayne Vaughan

For Appellants:

Scott L. Summers, Esq. (WV #6963)
Robert H. Akers, Esq. (WV# 9622)
Offutt Nord, PLLC
812 Quarrier Street, Suite 500
Post Office Box 2833
Charleston, West Virginia 25330-2833

and

E. Spivey Gault, Esq.
Carl J. Marshall, Esq.
Gault, Marshall & Box, PLLC
Post Office Box 30
129 South Water Street
Paducah, Kentucky 42002-0030
Counsel for Ingram Barge Company, The Ohio River Company LLC and The Ohio River Terminals Company LLC

TABLE OF CASES AND AUTHORITIES

CASES

AUTHORITIES

OTHERS

SUMMARY OF ARGUMENT

Vaughan filed a motion for partial summary judgment to prevent the Barge Line Defendants from asserting and proving at trial a defense based on W.Va. Code §§ 19-25-1, *et seq.* The Circuit Court, concluding that the property must be "held out" to the public for recreational use, and apparently overlooking the portion of this statutory scheme which states that an invitation or permission may be express or implied, and accepting Vaughan's characterization of his interrogatory answer in which he listed facts which he contended supported his position that the decedent had express and implied permission to swim around and dive from the barges, granted that motion.

In Vaughan's appellate brief he abandons his previous position that this was a case of dangerous instrumentality and adopts the position that this is a maritime tort case which is controlled exclusively by Maritime Law. The Barge Line Defendants agree this is an alleged maritime tort and General Maritime Law controls, however, the Recreational Use Statute is a permissible supplementation of General Maritime Law. Vaughan's change of legal theory apparently suits his purpose now, but it indicates his prior statements couching his interrogatory answer in terms of dangerous instrumentality were not serious.

The central issue in this appeal is whether the Recreational Use Statute does not apply as a matter of law. Has Vaughan proven no genuine issue of material fact exists from which one could conclude that the elements of the Recreational Use Statute could be met?

A. Liability Insurance

At the outset of Section IV of Vaughan's brief, he raises as a "preliminary matter" an issue pertaining to liability insurance. Vaughan acknowledges that this issue is raised for the first time in the context of Vaughan's brief and is "an issue that has not been addressed by the underlying Court."

In rendering its opinion in this matter, the Supreme Court of Appeals of West Virginia must not consider the discussion contained the first paragraph of Section IV of Vaughan's brief on page 8.

This Court has set forth a bright line rule in this regard.

> Although our review of the record from a summary judgment proceeding is *de novo*, this Court for obvious reasons, will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion. To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling.

Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 474 S.E.2d 872, 880 (W. Va. 1996).

This rule was re-affirmed by the Court in its recent opinion in *Adkins v. Gatson*, 624 S.E.2d 769, 774 (W. Va. 2005). In *Adkins*, the Court cited to its opinion in *Maxwell v. Maxwell*, 67 S.E. 379 at 380-381 (W. Va. 1910) wherein it addressed the issue of an appellate court's authority to review evidence not submitted to a lower tribunal:

> [W]hat is appellate jurisdiction? Does it include the power to do other than to review upon the record made below? Does it not relate wholly to the consideration of that which has been acted upon by the court from when comes the appeal? May [an appellate] court do an original thing, act upon something that has never been heard in the court below, and call that the exercise of appellate jurisdiction? We do not think so. It is not in reason to hold . . . .
>
> . . . [An appellate] court cannot hear evidence other than that brought up for review, except in the exercise of original jurisdiction. . . . [This] means

> that . . . [an appellate court] shall deal only with evidence taken below and brought up for the purpose of a review of an order or decree made upon it below. It means that in using our appellate powers we shall consider no other evidence. . . .

Id.

In addition to raising new arguments for the first time on appeal, Vaughan relies on factual assertions in his brief which are not in the record currently before the Court. Specifically, on pages 7 and 8 of Vaughan's brief, he references deposition testimony of Sandra Strom, David Strom and Stephanie Durst as well as a "911 Report." Copies of certain pages of the deposition transcripts and the "911 Report" are attached to Vaughan's brief as exhibits. None of this information was raised before the Circuit Court, therefore, none of it was considered by the Circuit Court in rendering its decision which is the subject of this appeal. Therefore, it must not be considered by the Court. As was stated in *Powderidge Unit Owner's Ass'n*:, "[t]o be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling." *Powderidge Unit Owner's Ass'n*, 474 S.E.2d at 880 (W. Va. 1996). If the Court chooses to consider these new factual assertions and argument, they are of no consequence to the issue before the Court.

Vaughan claims, for the first time in his Appeal Brief, that because the Barge Line Defendants possess an insurance policy, which is not part of the record in the court below, that Vaughan should prevail in this appeal even though Vaughan has presented no proof the policy was sold, issued, or delivered in West Virginia as expressly required by W.Va. Code § 19-25-7. Additionally, although this issue should not even be addressed as part of this appeal, the Barge Line Defendants are prepared to prove, at the appropriate time, this policy was not sold, issued, or delivered in West Virginia and

that the policy was, in effect, excess coverage such that the Barge Line Defendants were self-insured to a very large extent.

This Court should refuse to address the issue of whether a policy of liability insurance deprives the Barge Line Defendants of the protection of W.Va. Code §§ 19-25-1, *et seq.* because this issue was not presented to the trial court and was not the basis for the ruling which is being appealed. The Barge Line Defendants have not been afforded any opportunity to create a record on this issue for this Court to review and, in fact, the inclusion of this argument by Vaughan supports the argument of the Barge Line Defendants that the motion for summary judgment was premature.

Should this Supreme Court of Appeals be persuaded to consider this issue, Vaughan's argument must fail because the policy was not sold, issued, or delivered in West Virginia. W. Va. Code § 19-25-7, relating to insurance policies states:

> Any policy or contract of liability insurance providing coverage for liability sold, issued or delivered in this state . . . waives or agrees not to assert as a defense . . . the immunity to liability . . . .

W. Va. Code § 19-25-7 (1993) (emphasis added).

The policy of insurance to which Vaughan refers states it was sold to the first named insured, Ingram Industries, Inc., and delivered in Nashville, Tennessee.

There is no proof in this record from which any court could conclude this policy was sold, issued, or delivered in West Virginia. Without this proof there is not even an issue of fact upon which Vaughan can stand, let alone any set of facts which would support a summary judgment.

The intent of W. Va. Code § 19-25-7 is clear. If landowners are self-insured they shall not be exposed to liability but, if they are insured at the time of the loss, then they

shall not be entitled to the protection of this statutory scheme unless they request the protection afforded by it. Given the appropriate opportunity, the Barge Line Defendants will prove that on May 21, 2004, they were primarily self-insured. The Barge Line Defendants had their own assets at stake in this matter just as any self-insured landowner with an excess policy would. Therefore, they were exposed to the risks and liabilities which W.Va. Code §§ 19-25-1, *et seq.,* seek to eliminate when persons use their property for recreational purposes.

As Vaughan should be aware, this issue is not properly before this Court, having not been raised in the Circuit Court.

B. Maritime Law

Vaughan argues that the General Maritime Law preempts the application of W. Va. Code §§ 19-25-1, *et seq.* in this case and has relied solely on *McMellon v. United States*, 338 F.3d 287 (4th Cir. 2003) (*"McMellon I")* which was vacated by the court *en banc* in *McMellon v. United States*, 387 F.3d 329 (4th Cir. 2004), *cert. denied* 544 U.S. 974, 125 S.Ct. 1828, 161 L.Ed.2d 724 (2005) (*"McMellon II*). The *McMellon I* court noted in its opinion, and Vaughan failed to mention, that at least one U. S. District Court (the Middle District of Tennessee) has applied a state's Recreational Use Statue in an admiralty case. See *Pearce v. United States*, 261 F.3d 643 (6th Cir. 2001) (noting that the Middle District of Tennessee applied this statute but declining to examine the issue).

The Barge Line Defendants agree, as they have stated before, that this case appears to be an alleged maritime tort and that General Maritime Law controls. However, Maritime Law may be supplemented by state law. W. Va. Code §§ 19-25-1, *et seq.*, do not conflict with General Maritime Law where both limit the liability of a vessel

owner to cases of willful and wanton conduct where a person boards another vessel gratuitously for his own recreation.

The application of the Recreational Use Statute in this matter would not offend the notion of a uniform General Maritime Law. If Vaughan's decedent gained access to the vessels or mooring structures for any purpose which was inimical to the Barge Line Defendants' legitimate interest, then the liability of the vessel owner would only be for willful and wanton misconduct. Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 5-5 (4th ed. 2004).

Courts have consistently held that one who boards a vessel gratuitously for his own recreation does so for purposes which are inimical to those of the vessel owner. *Ribeiro v. United Fruit Co.*, 284 F.2d 317 (2nd Cir. 1960) (night watchman fell from oil barge where he was not crewmember and owner owned him no duty of reasonable care where he was on vessel for purposes "inconsistent with" or inimical to owner's interests); *Ryder v. United States*, 373 F.2d 73 (4th Cir. 1967) (visitor on seaplane was aboard for purposes inimical to interests of owner where she boarded vessel for irresponsible frolic); *Group Therapy, Inc. v. White*, 280 F.Supp.2d 21 (W.D.N.Y. 2003) (taking keys for joyride, person on vessel without owner's permission was inimical to vessel owner's interest - summary judgment for vessel owner); *Johnson v. Mobile Towing & Wrecking Co.*, 224 F. Supp. 811 (SD. Ala. 1963), *aff'd*, 339 F.2d 205 (5th Cir. 1964) (person who boarded vessel for own pleasure was owed no duty of care).

The limited liability imposed by W. Va. Code §§ 19-25-1, *et seq.*, for only deliberate, willful, or malicious actions is the same as that imposed by the General Maritime Law on vessel owners with regard to those who are on the vessels of others

for purposes which are inimical to (i.e., inconsistent with) the legitimate interests of the vessel's owner. Here, if a jury were to conclude that Vaughan's decedent's death was caused by his presence on or around these vessels, he was clearly acting in a manner inconsistent with the legitimate interest of the vessel owner. The standards imposed by W. Va. Code § 19-25-1, *et seq.*, and the General Maritime Law are not different; rather they are the same.

Here, General Maritime Law does not extend a duty of reasonable care to parties who come onboard vessels for their own recreational purposes without the knowledge of the vessel owner. It would be inconsistent with General Maritime Law to extend a duty of reasonable care to those who come upon a cargo barge for their own pleasure. W. Va. Code §§ 19-25-1, *et seq.*, and the General Maritime Law are not inconsistent.

Where General Maritime Law is not complete and regulation of the subject is not pre-empted, courts may apply state law. See *The Tungus v. Skovgaard*, 358 U.S. 588 (1959). As long as state law does not change General Maritime Law it may be followed. See *Offshore Logistics v. Tallentire*, 477 U.S. 207, 222-223 (1986). Because W. Va. Code §§ 19-25-1, *et seq.*, and General Maritime Law both limit the duty of care in this case to willful and wanton conduct, they are not in conflict.

Vaughan also contends the Death on the High Seas Act, 46 U.S.C. app. §§ 761, *et seq.*, compels the application of the West Virginia Wrongful Death Act , W. Va. Code §§ 55-7-5, *et seq.*, in this case. It does not. 46 U.S.C. app. § 761 applies, "whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State . . . ." 46 U.S.C. app. §761(a) (1920) (emphasis added). The Ohio River does not fall within this definition.

Therefore, a death of a person on the Ohio River, as is the case here, cannot, by definition, be governed by the Death on the Highs Seas Act.

If state wrongful death statutes are allowed to apply in admiralty actions where there are significant maritime interests, it is only where such statutes compliment rather than conflict General Maritime Law. In the companion appeal, the law of West Virginia conflicts with General Maritime Law on the issue of personal consumption. Here, where state law would limit the exposure of the Barge Line Defendants to Vaughan and his decedent in the event the jury concluded Vaughan's decedent had ventured onto or around the Barge Line Defendants' barges for a recreational frolic, state law would be consistent with and supplement the General Maritime Law.

C. A Genuine Issue Of Material Fact Does Exist Which Should Have Prevented The Circuit Court From Granting The Partial Summary Judgment

Although Vaughan tries to confuse this issue, it is really very simple. The plain language of W. Va. Code §§ 19-25-1, *et seq.*, states that if a landowner "directly or indirectly invites or permits, without charge, any person to use such property for recreational purposes" the landowner's liability to that person is limited.[1] Vaughan alleged in paragraph 26 of his Amended Complaint that his decedent was invited onto the barge:

> That, by allowing placement of the barge on the riverbank in the Park and by maintaining the premises in or around the barge, the Defendants invited the public, including children, onto and to use the barge. By its placement on the Park premises, the barge became part and parcel of the Park and invited children on or around it.

[1] In fact, several state courts have adopted an interpretation of this version of the Recreational Use Statute which protects landowners even thought no express or implied invitation or permission is alleged. This is discussed in Section D. West Virginia has not, apparently, addressed this question.

Amended Complaint of Carl Wayne Vaughan, individually and as Administrator of the Estate of Carl Wayne Vaughan, and Barbara Vaughan ("Vaughan's Amended Complaint"), paragraph 26, pp. 4-5.

Vaughan himself has stated that his decedent had both express and implied permission to use the barges and the area for recreation. In his answer to an interrogatory designed to learn the factual basis of his allegation, he identified several facts which he claimed supported that allegation, including the presence of an easement, the use of the barges and moorings for recreation, and the size and shape of the moorings which allegedly allowed access to the barges.

If, at trial, Vaughan attempts to prove facts from which a jury could conclude his decedent had express or implied permission to use the fleeting area for recreational purposes, then the Barge Line Defendants are entitled to assert this defense. Given that this was Vaughan's motion for summary judgment, it was incumbent upon him to establish that there was no genuine dispute of material fact - taking all inferences in favor of the non-movant Barge Line Defendants. Perhaps he could have done so had he conceded that his decedent was a trespasser if he were on the barges and/or if he had disavowed his detailed interrogatory answer - but he did neither.

Vaughan's Response to Appellants' appeal brief contains a lengthy discussion in which he contends that his decedent may have had an invitation - but not permission - to enter the Barge Line Defendants' property. (Appellee's Response Brief, pp. 17 -18) Vaughan is apparently trying vainly to characterize his interrogatory answer in a favorable way - but he fails. The inescapable fact is that whether a jury could conclude from the "facts" alleged by Vaughan that his decedent had either an implied invitation or

permission, both are within the express language of the statute and both trigger the protection afforded therein.

D. Whether Property Was Held Out Is A Question Of Fact; Landowner Is NOT Required To Hold Out Property To Public By W.Va. Code §§ 19-25-1, *et seq.*

Vaughan argues that the Barge Line Defendants were wrong to assign error to the decision in the court below because it concluded W. Va. Code §§ 19-25-1, *et seq.*, required the Barge Line Defendants to "hold out" their property for public use - when that language is not found in the statute. Vaughan's argument misses the mark. This is an appeal from a motion for summary judgment. Even assuming this statute is interpreted to require a "holding out" of the property, there is an issue of fact on that question which would prohibit the entry of summary judgment. Vaughan himself states as fact that children used the barges for recreation and the action or inactions of the Barge Line Defendants in continuing to operate the fleet near a park by using large mooring chains and cables, which he claims were easily climbed, and allowing large ropes to hang down from the barges constituted implied permission to use the barge fleet. (Vaughan's Amended Complaint, Paragraphs 11 - 19) Certainly, the Barge Line Defendants did not intend to hold out their fleet for recreational use. However, should Vaughan elicit proof of the facts he alleged in support of his interrogatory answer and the allegation in his own Amended Complaint that his decedent was invited onto and to use the barge, he will be attempting to prove the decedent had implied permission and the Barge Line Defendants should not be prohibited from asserting this defense, as they are now by the Circuit Court's ruling. The Barge Line Defendants understand that Vaughan has attempted to recharacterize his interrogatory answer, but clearly even he believed the facts alleged in it created a question of fact on the issue of implied

permission. The facts alleged by the plaintiff in his Amended Complaint and his sworn interrogatory answer create a genuine issue of material fact on that issue.

Vaughan's characterization of the Barge Line Defendants' position is incorrect. The Barge Line Defendants believe that the trial court incorrectly held that the Barge Line Defendants must expressly hold out their property for recreational use. The statute says that a landowner may also do so by implied invitation or permission and that is exactly what Vaughan's interrogatory answer alleged.

The Barge Line Defendants do not believe West Virginia has answered the question of whether a property owner must grant an express or implied invitation or permission for the Recreational Immunity Statute to apply.

Contrary to Vaughan's argument, many courts have held that even landowners who do no hold their land out to the public are protected by recreational use statutes. There is apparently a split in authority among the states which have statutes which are similar to West Virginia's.

In *Barrett v. Pennsylvania Gas & Water Co.*, 631 F. Supp. 731 (M.D. Pa. 1985), the U. S. District Court, applying Pennsylvania law, found that the Recreational Use Statute shielded a landowner where a trespasser was swimming at a dam where "defendant continually attempted to preclude people from swimming, . . ." Barrett, 631 F. Supp. at 733. The court concluded that:

> an owner of land owes no duty of care to those who use the land for recreational purposes, and further, the landowner does not incur liability to one injured using his land for recreational purposes by virtue of the fact that the person was directly or indirectly invited or permitted onto the land.

Id., at 734.

The court reached this conclusion by interpreting a statute which is very similar to the West Virginia statute. The court found that the portion of the statute which stated "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes," *Id.*, quoting 68 Pa. Cons. Stat. Ann. § 477-3, meant what it said and was not restricted by the requirement be given to use the land.

This same provision is found in W. Va. Code § 19-25-2. A reasonable interpretation of the statute which gives meaning to the words as written is that, it provides immunity against those who have not been given permission to use their land. Otherwise, this paragraph has no meaning as the immunity rendered to those who grant express or implied permission to use their property is covered by the second paragraph of W.Va. Code § 19-25-1. See also *Livingston v. Pennsylvania Power & Light Co.*, 609 F. Supp. 643 (E.D. Pa. 1985); *Hahn v. United States*, 493 F. Supp. 57 (E.D. Pa. 1980).

The Superior Court of Pennsylvania reached the same decision in *Gallo v. Yamaha Motor Corp.*, 526 A.2d 359 (Pa. 1987), when it said:

> In the overall scheme of the Recreation Use Act, Section 3 is the threshold. A defendant landowner crosses this threshold and is therefore entitled to immunity when three conditions coalesce: (1) the landowner did not wilfully or maliciously fail "to guard or warn against a dangerous condition, use, structure, or activity" : on the land, 68 P.S. § 477-6; (2) the landowner did not charge the plaintiff for the recreational use of the land, and (3) the injured plaintiff entered the land for "recreational purposes," *id.* at § 477-3. The grant of immunity in Section 3 simply does not depend on whether the landowners have encouraged the plaintiff to enter the land.

Gallo, 526 A.2d at 364 (Pa. 1987).

The Supreme Court of Iowa, in *Peterson v. Schwertley*, 460 N.W.2d 469, 472-73 *id.,* (Iowa 1990), held that a landowner who was sued by a trespasser was protected by Iowa's recreation use statute. The court stated:

> We do not disagree with the contention that the purpose of this legislation was to encourage property owners to make lands suited for recreational uses available for that purpose. We believe, however, that a blanket abrogation of duty to all recreational users . . . will more readily promote that objective than will an abrogation of duty limited to recreational use by licensees and invitees.

Peterson, 460 N.W.2d at 471 (Iowa 1990).

In *Johnson v. Stryker Corp.*, 388 N.E.2d 932 (Ill. 1979), the court held that even though land was not open to all members of the public, the landowner was protected by the Recreational Use Statute. The court stated it was "more reasonable to believe that the legislature . . . wished to protect landowners whose property is used gratuitously, with or without their permission, for recreational purposes." *Johnson,* 388 N.E.2d at 935 IIII. 1979) (citations omitted).

Vaughan relies on several cases to argue that this Court should imply into W.Va. Code §§ 19-25-1, *et seq.*, a requirement that landowners must expressly hold out their property to the public for recreation. Each of these cases fails to provide assistance to the Court here. In *Gibson v. Keith,* 492 A.2d 241 (Del. 1985), the court restricted the application of the Delaware statute to those who offered their land for recreation but did not consider, as here, a set of facts in which Vaughan claims the decedent, as a member of the public, entered the Barge Line Defendants' property for his own amusement, without charge and with the express or implied permission of the landowner. *Hughes v. Quarve & Anderson Co.*, 338 N.W.2d 422, 427 (Minn. 1983), considered a statute which specifically excluded liability to trespassers. W.Va. Code §§ 19-25-1, *et seq.*, have no such exclusion. In *Craig v. Sepulvado,* 709 So.2d 229 (La. App. 1998), the court held that where guests were injured on property not open to the public, the Recreational Use Statute did not apply. Again, there was no proof, as is

alleged by Vaughan here, that a member of the public was harmed after being provided with express and implied permission to enter. *Hall v. Henn,* 802 N.E.2d 797, 799 (Ill. 2003), is similar to *Craig* in that the plaintiff was an invited guest and not, as Vaughan's decedent was, a member of the general public.

Crawford v. Tilley, 780 P.2d 1248 (Utah 1989), is another case where an invited guest was harmed and the public was not alleged to have received an implied invitation. In *Coursey v. Westvaco,* 790 S.W.2d 229 (Ky. 1990), the Kentucky Supreme Court held that for the Recreational Use Statute to apply, there must be some proof the landowner knows, or should know, the public is making recreational use of the property and that by some words, action, or lack of action, one might infer an intent to permit use of the property. These are precisely the facts Vaughan has alleged and which he will seek to prove at trial if his Amended Complaint and his interrogatory answer are any guide.

Georgia Power Co. v. McGruder, 194 S.E.2d 440 (Ga. 1972), simply holds that where there were "Keep Out" signs posted at the time of the accident, the landowner could make use of the Recreational Use Statute. Obviously, there was no claim and there were no facts identified in *Georgia Power* to support a claim that the decedent had implied permission to use the facility.

The plain language of W.Va. Code §§ 19-25-1, *et seq.*, does not require a holding out to the public of property for recreational use. To imply that provision into this statute would narrow the protection afforded by the statute and subject landowners to liability where the legislature intended to restrict that liability. Further, to apply such a narrow reading of the statute ignores the language of 19-25-2 which provides immunity

to an owner of land who "indirectly invites" the use of his property, such as is alleged in the case at bar.

To narrow the reading of the statute to require a hold out of the property for recreation use, and to ignore the indirect invitation language of the statute, is contrary to this Court's long held rules of statutory construction. In Syllabus Point 3 of *Meadows v. Walmart Stores, Inc.*, 530 S.E.2d 676 (W. Va. 1999), this Court held, "[a] cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute."

E. Circuit Court's Construction Contravenes Public Policy

Vaughan's reply to the public policy argument made by the Barge Line Defendants amounts to nothing more than a bald assertion that The Ohio River Company did not donate the land to the Greater Huntington Parks and Recreation District ("GHPRD") for recreational purposes. His Amended Complaint, however, states, "[t]hat, in 1993, The Ohio River Company conveyed the Park to GHPRD contingent on the GHPRD's maintaining the land as a public park. The Deed evidencing the transfer specifically requires that the GHPRD use the area for a public park." (Vaughan's Amended Complaint, Paragraph 8, p. 2.).The deed which conveyed the land to the GHPRD recites the consideration to be $10.00 and the purpose of the conveyance was for the land to be used as a public park. The Grantor (i.e., The Ohio River Company) retained no greater rights in the property - for example, the right to moor barges and to continue to carry on its operations - than those which it already had. The Ohio River Company did not convey the land in order to then set up a fleeting operation. Clearly, it had that right <u>before</u> the land was conveyed.

The Ohio River Company was required to obtain a permit from the Public Lands Corporation to relocate the fleet from one area of the park property to another. There is no indication whatsoever that the transfer of the property to the GHPRD had anything to do with the relocation of the fleet. However, if the Court believes this is a key issue, it also raises a question of fact which would prevent summary judgment. Had this issue been raised by Vaughan, the Barge Line Defendants would have had the opportunity to submit proof on this point. In fact, Mr. McClelland, the Director of the GHPRD, has testified that this transaction was a gift and if this issue is dispositive here, the Barge Line Defendants request leave of this Court to supplement the record with deposition testimony from Mr. McClelland.

The Barge Line Defendants retained various ownership rights in the park property which would allow them to donate the property while continuing to operate their business. If the landowners thought that by donating property for recreational purposes, while retaining some rights of ownership and the right to continue their business, they would be treated differently from those who retain ownership or lease property for recreation, they would, as a matter of common sense, not make such donations.

F. Vaughan Has Now Retreated From His Position Taken Before The Circuit Court That His Interrogatory Answer Was Intended To Prove Dangerous Instrumentality

Vaughan now argues that the court did not create a loophole in the Recreational Use Statute by accepting Vaughan's argument that even if he said the decedent had permission to be on the barges, he only did so to prove dangerous instrumentality.

Vaughan argued before the Circuit Court that his interrogatory answer which recited facts supporting his allegation that his decedent had express or implied

permission to use the moorings and barge fleet for swimming and diving could be explained away by saying this was an attempt to meet the elements of the Dangerous Instrumentality Doctrine. (See discussion and citation to record on pages 25 and 26 of Appellant Brief of Ingram Barge Company, The Ohio River Company LLC and The Ohio River Terminals Company LLC.) Now that this explanation has already been offered to the Circuit Court, Vaughan has decided to change course and argue that the Dangerous Instrumentality Doctrine does not apply here but, instead, that General Maritime Law applies and there is no conflict. After jettisoning the Dangerous Instrumentality Doctrine, Vaughan mischaracterizes the duty, if any, which the Barge Line Defendants would have owed to someone who is on or around their vessels for a purpose which is inconsistent with or "inimical" to the vessel owner's legitimate interests. This standard has been previously discussed and there is no benefit to the Court to repeat it now - except to say that after having created the loophole issue by asserting the Dangerous Instrumentality Doctrine as an explanation for the facts alleged in his Amended Complaint and recited in his interrogatory answer, Vaughan now abandons that doctrine.

One thing is certain: Vaughan does not dispute that a loophole would be created in the Recreational Use Statute by his use of the Dangerous Instrumentality Doctrine.

G. In The Mitigation Agreement The State Of West Virginia Extends The Protection Of W.Va. Code §§ 19-25-1, *et seq.* To The Ohio River Company

Vaughan argues the Mitigation Agreement does not extend the protection of W.Va. Code §§ 19-25-1, *et seq.* to the Barge Line Defendants because it was an agreement between private parties and because at the moment the decedent may have

been in the navigable waters of the State of West Virginia (i.e., The Ohio River) and not on any property owned by the Barge Line Defendants.

The State of West Virginia (not a private party, as argued by Vaughan) extended the protection of the Recreational Use Act to The Ohio River Company. Obviously, the Public Lands Corporation foresaw that the park would be used gratuitously for recreation by members of the public and that it was reasonable to extend this protection to The Ohio River Company as the owner of an easement, riparian rights, the possessor of right to operate and maintain a fleet moored to the subject property, and the possessor of right to maintain and build mooring structures on the subject property. This is clear evidence of the State's expansive understanding of the intent of the Recreational Use Act - to protect landowners whose property is used gratuitously by the public for recreation.

Vaughan raises, for the first time, a question not raised in the Circuit Court, which is whether the Barge Line Defendants are "owners" within the meaning of W.Va. Code § 19-25-5. Incredibly, Vaughan argues that as owners of an easement - equipment attached to the land by cables and chains - riparian rights; and mooring structures buried in the park land, the Barge Line Defendants do not come within this definition. Clearly, they retained ownership of interests in land and machinery as defined in W.Va. Code § 19-25-(a), including "machinery or equipment thereon when attached to the realty." At the very least, there is a question of fact to be resolved on this issue. Vaughan has previously alleged that the Barge Line Defendants have liability because the equipment, including the mooring, was accessible to park patrons. (Vaughan's

Amended Complaint, Paragraphs 10 - 18, pp. 2-3.) He has not withdrawn this allegation nor stated an intent to do so.

Clearly, W.Va. Code § 19-25-3 prescribed the limited liability, if any, of The Ohio River Company as an easement holder. Vaughan seems not to dispute this conclusion. Rather, he says here, that the easement is not involved in this case in any way. Yet, in the interrogatory answer he refuses to withdraw, Vaughan says the easement was an express permission to use the property for recreation.

Finally, Vaughan argues that the Barge Line Defendants did not have the capacity to grant permission to swim in the river and that since the drowning happened in the river, W.Va. Code §§ 19-25-1, *et seq.* do not apply. The Barge Line Defendants agree they had neither the legal capacity nor the duty to prevent Vaughan's decedent from swimming in the Ohio River or to warn him against doing so. However, Vaughan has alleged in his Amended Complaint that access to the barges, the moorings, and the riverbank caused or contributed to this accident. Unless he is now willing to stipulate this is not so, there is a legitimate issue here for the application of W.Va. Code §§ 19-25-1, *et seq.*

Vaughan has always, until now, taken the position that the barges and mooring were part and parcel of the park and that the cable and moorings were secured to concrete pads buried in the park. (Vaughan's Amended Complaint, Paragraph 13 and 26, pp. 3-5.) He has also asserted that Justin Smoot and Randall Wayne Vaughan "as invitees without knowledge of the danger, entered upon the property of the Barge Line Defendants, ventured upon, swam around and jumped or dove off Barge F-14002 or

other barges tied thereto and, as a result, were drawn under the barges and drowned." (Vaughan's Amended Complaint, Paragraph 27, p. 5.)

Clearly, under this set of alleged facts, most of which the Barge Line Defendants deny, the Barge Line Defendants should not be precluded from having the opportunity to assert the protection of the Recreational Use Statute at trial.

CONCLUSION

Vaughan has claimed in his Amended Complaint and alleged facts in his interrogatory answer which, if accepted and/or proven, lead to the conclusion that the decedent made gratuitous recreational use of the Barge Line Defendants' property at the express or implied invitation and/or permission of the Barge Line Defendants. The Barge Line Defendants dispute these allegations but, should Vaughan attempt to prove and/or argue these allegations/facts at trial and thus attempt to convince the jury that the Barge Line Defendants are liable to Vaughan because Vaughan's decedent made gratuitous recreational use of their property, the Barge Line Defendants should not be prohibited from asserting W.Va. Code §§ 19-25-1, *et seq.*, as a defense.

If this Court concludes, based on the representations of Vaughan, the decedent made gratuitous recreational use of the Barge Line Defendants' property, with or without permission to do so, then he was acting in a manner inimical to the legitimate interests of the vessel owner and under General Maritime Law - which Vaughan now concedes applies. The vessel owners were only required to refrain from acting in a willful and wanton manner causing harm to Vaughan's decedent. This is the same standard found in the Recreational Use Statute, W.Va. Code §§ 19-25-1, *et seq.*

The partial summary judgment on the issue of the Recreational Use Statute was not appropriately granted because the allegations made by Vaughan, and not withdrawn by him, created a genuine issue of material fact which must be decided by a Jury after presentation of all facts and theories of liability as well as any and all defenses thereto - including the immunity provided under the West Virginia Recreation Use Statute.

RELIEF PRAYED FOR

It is respectfully submitted that the Circuit Court's Order granting partial summary judgment on this issue should be overturned.

Respectfully submitted,

Scott L. Summers, Esq. (WV#6963)
Robert H. Akers, Esq. (WV#9622)
Offutt Nord, PLLC
812 Quarrier Street, Suite 500
Post Office Box 2833
Charleston, West Virginia 25330-2833
Telephone: (304) 529-2868
Facsimile: (304) 529-2999

and

E. Spivey Gault, Esq.
Carl J. Marshall, Esq.
Gault, Marshall & Box, PLLC
Post Office Box 30
Paducah, Kentucky 42002-0030
Telephone (270) 442-1900
Facsimile: (270) 442-8247
Counsel for Appellants

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPEAL NO: 034327

CARL WAYNE VAUGHAN, as Administrator of the Estate of RANDALL WAYNE VAUGHN,

Plaintiff Below,
Appellee Herein,

v.

INGRAM BARGE COMPANY, THE OHIO RIVER COMPANY LLC and THE OHIO RIVER TERMINALS COMPANY LLC

Defendants Below,
Appellants Herein.

CERTIFICATE OF SERVICE

I, Scott L. Summers, one of the attorneys for Appellants, Ingram Barge Company, The Ohio River Company LLC and The Ohio River Terminals Company LLC hereby certify that on the 6th day of January, 2009, a true and correct copy of the foregoing **"Appellant Reply Brief of Ingram Barge Company, The Ohio River Company LLC and The Ohio River Terminals Company LLC"** was served on the parties hereto by United States Mail, postage prepaid, addressed as follows:

Charles M. Hatcher, Esq.
Hatcher Law Office
636 Fifth Ave.
Huntington, WV 25701
Counsel for Plaintiff

W. Joseph Bronosky, Esq.
Campbell, Woods, Bagley, Emerson, McNeer, & Herndon, P.L.L.C.
Post Office Box 1835
Huntington, WV 24719-1835
Counsel for G.H.P.R.D.

Scott L. Summers, Esquire (WV#6963)